IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 980 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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RANCHHODBHAI BALVANTSINH KOLI PATEL - Appellant
Versus
STATE OF GUJARAT - Opponent

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Appearance :
MS SADHANA SAGAR for Appellant.
MR KP RAVAL, APP for Opponent.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 13/10/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. The present appeal is filed by the appellant – original accused against the judgment and order dated 01.11.1999 passed by the learned Special Judge (Atrocity) and Additional Sessions Judge, Banaskantha at Palanpur in Special Case No. 101 of 1999 convicting the appellant – accused for an offence punishable under Section 363, 366 & 376 of the Indian Penal Code. The learned Judge has imposed sentence, for an offence under section 363 of R.I. of 5 years and fine of Rs. 10,000/- and in default thereof, to undergo further S.I. of one year. The learned Judge has further imposed sentence, for an offence under section 366, of R.I. of 6 years and fine of Rs. 15,000/- and in default thereof, to undergo further S.I. of one and half year. The learned Judge has further imposed sentence, for an offence under section 376, of R.I. of 10 years and fine of Rs. 25,000/- and in default thereof, to undergo further S.I. of two years. The learned Judge has passed an order to undergo the aforesaid sentences concurrently. The

appellant – accused was, however, acquitted from the charge of offence under Section 3 (2) (v) of the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989.

2. The brief facts of the prosecution case as narrated by the Learned Trial Judge in his judgment and order are that when the work of Gabbar Rope-way of Ambaji was in progress, the victim girl aged about 13 years as well as other girls of village Padalia used to go for labour work at about 8.00 a.m. in the morning and return in the evening. On 18.06.1998, the victim girl went for labour work at the site of Gabbar Rope-way in the morning and did not return in the evening. The complainant, father of the victim girl has, therefore inquired with other persons who had gone for labour work along with the victim girl. He was informed that they did not meet the victim girl in the evening. The complainant, therefore, made further inquiry about his daughter at the place of relatives but she was not found from anywhere. The complainant therefore met the Contractor working for the project of Gabbar Rope-way who informed the complainant that the victim girl was working with the accused, Ranchhodbhai

Balvantsinh Koli Patel and both of them were not found after 4.00 O'clock on 18.06.1998. It is also the case of the prosecution that a month prior to the date of filing of the complaint, one Mr. Bhavansinh Darbar who was from the village of the accused and was working at the project of Gabbar Rope-way had gone to the house of the complainant and informed him that the victim girl was taken by the accused on 18.06.1998 at his house at Thana Garjan village. Thereafter on making inquiry at the house of the accused, it was found that the victim girl as well as the accused have gone to another village. The complainant, therefore, filed complaint with the Ambaji Police Station stating that the accused has tempted his daughter and kidnapped her with a view to develop illicit sexual relations with her. On the basis of this complaint, Ambaji Police Station has registered the complaint being C.R. No. 12/1999 against the accused for commission of an offence under Sections 363 and 366 of I.P.C. During the course of investigation, the victim girl was found and on further inquiry from her, it was revealed that the accused has committed rape and hence, offence under Section 376 of IPC was also registered against the accused.

3. Pursuant to the registration of FIR, investigation was put into motion. During the course of investigation, statements of the witnesses were recorded, panchnama of the scene of offence was prepared, clothes of the accused as well as victim were also recovered by drawing a panchnama, which were sent to F.S.L. for chemical analysis. After obtaining F.S.L. Report and the certificate issued by the Doctor and also obtaining the evidence of the birth of the victim, since sufficient incriminating evidence was found against the accused, he was charge-sheeted in the Court of learned Judicial Magistrate First Class at Danta. Since the victim girl is belonging to the schedule caste, a charge-sheet was also filed under Section 3 (2) (v) of the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989.

4. As the offence under Section 363, 366 & 376 was exclusively triable by the court of Sessions, learned JMFC, Danta committed the case to the Sessions Court, Panalpur. The learned Special Judge, Palanpur to whom the case was made over for trial, framed charge against the accused for commission of the offence punishable

under Section 363, 366, 376 of IPC as well as under Section 3 (2) (v) of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989.

5. The charge was read over and explained to the accused as the accused pleaded not guilty to the charge. He was put to trial and tried by the learned Special Judge (Atrocity) & Additional Sessions Judge, Palanpur in Sessions Case No. 101 of 1999.

6. To prove the culpability of the accused, prosecution has in all examined as many as 7 witnesses, details of which are given in paragraph 3 of the impugned judgment. The prosecution has also produced 16 documents and relied upon the contents of the same, details of which are enumerated in paragraph 4 of the impugned judgment and order.

7. After recording of the evidence of the prosecution witnesses was over, the learned Special Judge (Atrocity) & Additional Sessions Judge, Palanpur explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his

further statement, as required under Section 313 of the Code. In his further statement, the accused denied the case of the prosecution by reiterating that he has been falsely implicated.

8. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Special Judge (Atrocity) & Additional Sessions Judge, Palanpur has held that the victim girl was subjected to rape by the accused and the prosecution has established that the charge levelled against the accused was proved beyond reasonable doubt and, therefore, the accused was held guilty of the offence of committing rape and, therefore, he was convicted of the offence under Section 363, 366 & 376 of the Indian Penal Code.

9. Thereafter, the learned Special Judge (Atrocity) & Additional Sessions Judge, Banaskantha at Palanpur heard the accused and his advocate on sentence and looking to the gravity of the offence committed by the accused and looking to the circumstances, the accused was sentenced for an offence under section 363 of R.I. of

5 years and fine of Rs. 10,000/- and in default thereof, to undergo further S.I. of one year. The learned Judge has further imposed sentence for an offence under section 366 of R.I. of 6 years and fine of Rs. 15,000/- and in default thereof, to undergo further S.I. of one and half year. The learned Judge has further imposed sentence for an offence under section 376 of R.I. of 10 years and fine of Rs. 25,000/- and in default thereof, to undergo further S.I. of two years. The learned Judge has passed an order to undergo the aforesaid sentences concurrently. The appellant – accused was, however, acquitted from the charge of offence under Section 3 (2) (v) of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989.

10. Being aggrieved by the said judgment and order, the accused has filed this appeal through Jail.

11. Ms. Sadhna Sagar, learned advocate appearing for the appellant has taken us through the oral as well as documentary evidence which are on record and also assailed the judgment and order of the learned Special

Judge (Atrocity) & Additional Sessions Judge dated 1.11.1999. She has submitted that the Learned Trial Judge has erred in convicting the appellant – accused though there is no sufficient or cogent evidence showing his guilt in the matter. She has further submitted that the Learned Trial Judge has failed to appreciate that the appellant is innocent and has not committed the alleged offence. The victim girl was in love with the accused and both of them liked to each other. The victim girl was a consenting party and out of her own free will and desire, she has gone along with the accused. The victim girl and the accused both lived together for about four to five months and during this period, because of the sexual relations between them, the victim girl became pregnant and at the time of her medical examination, she was conceiving a three to four months child. Both the victim as well as the accused were ready and willing to marry with each other. However, because the parents of the victim girl were not agreeable and they were demanding huge amount from the accused, marriage could not be taken place and hence, false complaint was filed against the accused and that too after a long delay of more than seven months. The medical certificate says the age of the

victim girl between 15 to 17 years and hence, it can be said that she is more than 16 years old and since she was a consenting party, the charge levelled against the accused is not sustainable. She has, therefore, submitted that the accused may be acquitted from the charge levelled against him.

12. Mr. K.P. Raval, learned Additional Public Prosecutor appearing for the State, on the other hand, has supported the case of the prosecution and submitted that no interference is called for in the judgment and order of conviction passed by the Learned Trial Judge. No case is made out by the appellant to take any different view in the matter. The father of the victim girl in his deposition has stated that the victim girl was aged about 13 years old. He has further submitted that the Principal of the Primary School Mr. Dilipkumar Gamit in his deposition Exh. 33 has produced an extract from the general register of the School at Exh. 35 and as per the said register, the birth date of the victim girl is 01.06.1987. The incident was taken place on 18.06.1998 and on the basis of this evidence of the Principal as well as general register of the School, the age of the victim girl was 11

years. He has, therefore, submitted that even if it is presumed that the victim girl has given her consent, the consent of the victim girl who is below the age of 16 years cannot be taken into consideration as per the provisions contained in Section 375 of the IPC. He has, therefore, submitted that the age of the victim girl was proved by the evidence of her father as well as the evidence of the Principal of the primary school. The prosecutrix was minor aged about 13 years at the time of incident and this fact was proved. The charge regarding rape has also been proved on the basis of FSL Report produced by the prosecution. Mr. Raval has further submitted that the Learned Trial Judge has rightly convicted the accused for the offence committed by him and no interference is called for by this Court especially when a well-reasoned order has been passed by the learned Special Judge considering all the aspects of the matter. He has, therefore, submitted that the appeal filed by the appellant – accused deserves to be dismissed.

13. We have considered the submissions advanced by Ms. Sadhna Sagar, learned advocate appointed by Legal Aid

on behalf of the appellant and Mr. K. P. Raval, learned Additional Public Prosecutor appearing for the respondent – State of Gujarat at length. We have also undertaken a complete and comprehensive exercise of appreciating all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections.

14. In order to find out whether the prosecution has established the charge against the accused beyond reasonable doubt and whether the learned trial Judge has recorded a just and correct conclusion holding the accused guilty, we may first advert to the oral evidence led by prosecution.

15. P.W. No. 2 – Dr. Jayantibhai Ambalal Patel – Exh. 22 was the Medical Officer at Cottage Hospital, Ambaji. He has examined the victim girl on 05.02.1999. He has stated in his examination-in-chief that the girl was brought before him under police yadi. He has submitted his report wherein it was observed that the private part of the

victim girl was fully developed. Her breast was also fully developed. It was soft and nipple was projected. No signs of injury were found. No blood stains or semen were found either on the clothes or on the private part. The hymen of the victim girl was ruptured and two fingers were smoothly passed. He has also recommended for further examination of pregnancy and determination of the age of the victim girl to the General Hospital, Palanpur.

16. P.W. 1 – Dr. Babulal Kantilal – Exh. 16 was the Medical Officer at Civil Hospital, Palanpur. He examined the victim girl on 05.02.1999. He has stated that the history was given by the victim girl and as per the said history, the accused has taken her away about six months back. There was regular menstrual and pregnancy period was about two months. Ossification test was carried out and as per the said test, the age of the victim girl was found to be 15 to 17 years. He has given his Certificate at Exh. 22. He has also opined that the victim girl looked like a major from her appearance. The breast of the victim girl were fully developed and pubic heirs at the secret place of the body were found. The victim girl was above 15

years but has not completed 17 years.

17.P.W. 3 – Ladubhai Ratabhai – Exh. 25 is the father of the victim girl. His deposition is recorded on 28.09.1999. He has stated that the incident was taken place about one and half year ago. He has further submitted that his daughter was going for labour work. She was working with one Mr. Ranchhod and on the basis of the information received from the Contractor, he has inquired of missing of the girl from the village Dhana Karjan. He met the Sarpanch and 10 days time was given to the accused to report to the Ambaji Police Station. Since he has not reported, the complaint was filed at Exh. 26 on 24.05.1999 with Ambaji Police Station.

18.P.W. 4 is the victim girl. Her deposition was recorded at Exh.27. She has confirmed that she was working with the accused who was doing centering work with the same Contractor. She came into contact with him. He has tempted her to get marry with him. She has asked the permission of her mother to go to Pavagadh with the

accused. However, mother did not grant the said permission. She was already engaged with one Bhurabhai of Naivada. For going to Pavagadh with the accused, she has first gone with him to Ambaji, Himmatnagar, Godhra, Sarangpur where her aunt was residing. She has stayed there for the whole day and during this stay, the accused has developed illicit sexual relations with her. Thereafter, they have gone to Vadodara and they lived together in one room and stayed there for one month. They were also doing their farming activities at Vadodara. From vadodara, they have gone to Jamnagar. Thus both of them stayed together for quite sometime. She has also stated in her deposition that her father had come to the place of the accused. However, the accused has stated that she was not there. She has also confirmed that she has given her police reply as per the say of the police authority. She has expressed her willingness to go to her parent's house provided the parents would not beat her.

19. P.W. 6 – Dilipkumar Lalubhai Gamit Exh. 33 is the Principal of the Padalia Primary School. He has produced extract from the General register at Exh. 35.

As per the said register, birth date of the victim girl was 01.06.1987. He has also confirmed that normally when the exact date of the birth of any student who gets admission is not available, it always starts from the first of June.

20. P.W. 7 – Subhashchandra Kirtilal Solanki – Exh. 36 is the P.S.I. of Ambaji Police Station. He has stated in his deposition that the investigation was made by P.S.I. Chavda. He has arrested the accused and charge-sheet was also filed by him. As per his deposition, the victim girl was minor at the time of occurrence of the event.

21. F.S.L. Report is filed at Exh. 38 and this report confirms that the accused has committed sexual intercourse with the victim girl.

22. In view of the aforesaid evidence, according to this Court, it is duly proved that the victim girl who was aged about 15 to 17 years on the day of the incident was raped and the oral testimony of the victim girl which is unimpeachable is sufficient to establish the charge of

rape levelled against the accused. Moreover, the medical evidence of both the Doctors as well as F.S.L. Report corroborate the charge levelled against the accused. It is settled principle of law that conviction can be based on oral testimony of the victim girl without insisting for corroboration if the same inspires confidence. There is no reason for this Court to disbelieve the evidence of the victim girl, who is aged about 15 to 17 years old. The argument of the defence counsel that the money was demanded by the father of the victim girl has no foundation at all. In view of the evidence led by prosecution to prove the charge against the accused beyond reasonable doubt, more particularly, testimony of the victim girl along with medical certificates and F.S.L. Report, we are of the view that the accused has committed an offence under Sections 363, 366 & 376 of the Indian Penal Code.

23. After having held that the conviction recorded against the appellant accused under Sections 363, 366 & 376 of IPC has to be confirmed and maintained, the next question which falls for determination of this Court is as to what sentence should be imposed upon the accused.

The Learned Trial Judge has imposed sentence of 5 years, 06 years and 10 years respectively under Sections 363, 366 & 376 of IPC. However, looking to the facts found and evidence came on record, it appears to us that the sentence awarded is disproportionate to the offence committed by the accused. The appellant – accused cannot solely be held responsible for commission of such offence. The element of consent cannot be ruled out in the present case. It has come on record that the appellant – accused and the victim girl were working together. They liked to each other and were fallen in love with each other. The victim girl has accompanied the appellant – accused at different places and both of them have lived together for more than six months. The victim girl has not made any attempt to flee away or disassociate herself with the accused. On the contrary, they lived together like husband and wife and the victim girl was also introduced to the family members of the appellant – accused. It has also come on record that the father of the victim girl came to know that the appellant – accused has taken away his daughter and still he has not filed the complaint immediately. The defence of the appellant – accused that the parents of the victim girl

have demanded money cannot be wholly ignored.

24. Even there are lot of controversies about the age of the victim girl. On careful consideration and proper appreciation of the evidence led by the prosecution, it appears to the Court that there are lot of contradictions about the age of the victim girl. As per the evidence of P.W. 1 – Dr. Babulal Kantilal – Exh. 16, he examined the victim girl on 05.02.1999. He has stated that the history was given by the victim girl and as per the said history, the victim girl was kidnapped by the accused before six months back. On examining her, she was found pregnant for about two to three months. Ossification test was carried out and as per the said test, the age of the victim girl was found to be 15 to 17 years. P.W. No. 2 – Dr. Jayantibhai Ambalal Patel – Exh. 22 has also examined the victim girl. He has issued certificate with regard to her pregnancy. P.W. 3 – Ladubhai Ratabhai – Exh. 25, the father of the victim girl has stated that her age was 13 years on the date of incident. The victim girl in her deposition before the Court has also stated that her age was 13 years. As per the deposition of P.W. 6 – Dilipkumar Lalubhai Amin Exh.-33, Principal of the

Padalia Primary School, the victim girl was of 11 years old. This fact was stated by him on the basis of the General Register of the school. However, as per the Principal's own evidence, the school record is not reliable. In such a situation, the Learned Trial Judge has also believed the age of the victim girl between 15 to 17 years on the basis of ossification test.

25. When there are serious disputes about the age of the victim girl and her conduct itself raises a suspicion as to whether the rape was committed against her will, the conviction itself is sometimes not held to be justified. With regard to determination of age of the victim girl, it is worthwhile to refer to the observations made by the Hon'ble Supreme Court in the case of **Ram Murti V/s. State of Haryana, AIR 1970 S.C. 1020**. It is observed therein that in cases under Sections 366 and 376, age of prosecutrix is always of importance, particularly so where according to medical evidence, she was found to have been used to sexual intercourse and there was old rupture of hymen. Where the accused is sought to be acquitted of offence under Section 376, the Court should examine the question of age more closely. In the case

before the Hon'ble Supreme Court, an unproved and unexhibited school certificate was relied on. The Court took the view that there is no trust-worthy evidence on record on which the conclusion that prosecutrix was under 18 years of age on the date of incident, can safely be founded. In the present case, the evidence of the School Principal as well as the evidence of the victim girl and her father are found to be contrary to the medical evidence. If we accept the medical evidence which says that the victim girl was between the age of 15 to 17 years old, in that case, one can safely believe that she must be above 16 years and then the consent plays an important role. In the case of **Jinish Lal Sha V/s. State of Bihar, 2003 AIR SCW 74**, the charge against the accused was for kidnapping woman to compel her to marry and for rape. Sequence of events showed that prosecutrix accompanied accused willingly. Father of the prosecutrix stated in the FIR that prosecutrix went away by taking clothes and gold chain and some cash showing that there was no threat or inducement. The Court, therefore, held that accused was not liable to be guilty under Section 366 or 376 in absence of proper appreciation of evidence in regard to consent of

prosecutrix which is mandatory requirement before finding a person guilty under Section 366 or 376 of IPC. In the present case, the victim girl was lived with the accused for about six months, without any resistance. Both of them have agreed to marry with each other. Since the parents of the victim girl did not agree for the reasons best known to them, the marriage could not be taken place and the complaint was filed after about six months.

26. In the above view of the matter, even if we accept the version of the prosecution for the purpose of convicting the accused, looking to the conduct of the victim girl, her deposition, medical evidence, lack of adequate evidence regarding the age, we cannot confirm the sentence as awarded by the Learned Trial Judge and the same is required to be altered.

27. In view of the above facts and circumstances of the case and the discussion made, we are of the view that the interest of justice would better be served if the appellant – accused is awarded sentence for an offence under Section 363 of R.I. of 3 years and fine of Rs. 5,000/- and

in default thereof, to undergo S.I. of three months, and sentence for an offence under Section 366 of R.I. of 5 years and fine of Rs. 5,000/- and in default thereof, to undergo S.I. of three months, and sentence for an offence under Section 376 of R.I. of 6½ years and fine of Rs. 10,000/- and in default thereof, to undergo S.I. of six months. The Learned Trial Judge has already passed an order to undergo these sentences concurrently. Thus, maximum period of the sentence of R.I. is for the 7½ years (Seven and half years) for all the three offences and if the default is committed by the appellant – accused in payment of fine, in that case, he is required to go S.I. of one year i.e. 3 months + 3 months and + 6 months for all the three offences. In all, total period of sentence would be 7½ years. It has been stated at the bar by Ms. Sadhna Sagar, learned advocate appearing for the appellant – accused that the appellant – accused has already undergone the sentence of more than 7½ years by now. If this is so, the appellant – accused is required to be released forthwith.

28. In the above view of the matter, if the appellant – accused has already undergone sentence of more than

7½ years by now, the appellant – accused be set at liberty forthwith, if his presence is not required for any other offence. The respondent – State and/or Jail authority is directed to verify the period of sentence undergone by the accused and if he has already undergone the sentence of more than 7½ years by now, he may be set at liberty forthwith, if his presence is not required for any other offence.

29. With the foregoing reasons, the appeal succeeds partly and is accordingly partly allowed.

30. Direct Service is permitted.

[A. M. KAPADIA, J.]

[K.A. PUJ, J.]

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